LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S
FILED
AUG 27 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 341

CARL V. DANIELS and JAMES E. SPEENEY,
Petitioners,

vs.

THE FLORIDA POWER & LIGHT COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

SAMUEL J. POWERS, JR.,
First Federal Building,
Miami 32, Florida,
Counsel for Respondent Florida Power & Light Company.

BLACKWELL, WALKER & GRAY,
First Federal Building,
Miami 32, Florida,
Of Counsel for Respondent Florida Power & Light Company.

R. L. Mendenhall, Inc., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

TOPICAL INDEX TO BRIEF

Questions Presented	1
Statement	2
Argument	3
Conclusion	9
Certificate of Service	9

Authorities Cited

CASES

Daniels v. *Florida Power & Light Co.*, (5th Cir., 1963) 317 F.2d 41 ..... 2, 4, 5

Reed v. *Steamship Yaka*, (1963) U.S. , 10 L. Ed. 2d 448; 83 S. Ct. 6

Romero v. *Garcia & Diaz, Inc.*, (2nd Cir., 1961) 286 F.2d 347 8

Romero v. *International Terminal Operating Co.*, (1959) 358 U.S. 354, 3 L. Ed. 2d 368, 79 S. Ct. 468 8

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85, 90 L. Ed. 1099, 55 S. Ct. 872 6

Spaulding v. *Parry Nav. Co.*, (2nd Cir., 1951) 187 F.2d 257 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 341

CARL V. DANIELS and JAMES E. SPEENEY,
Petitioners,

vs.

THE FLORIDA POWER & LIGHT COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Respondent takes issue with the petitioners' statement of the questions presented on page two of the petition for writ of certiorari. For the most part the questions as presented by the petitioners merely state abstract issues of law unrelated to the concrete facts of the case at bar. The questions as stated are, moreover, argumentative in

the extreme and assume facts contrary to the conclusions reached by the District Court in this case.

The opinion of the United States Court of Appeals, Fifth Circuit, in this cause clearly discloses that there are but two issues which were decided by the Court of Appeals and which are completely dispositive of the case at bar, These issues may be succinctly stated as follows:

1. Whether the Court of Appeals was correct in affirming the District Court's finding, as the trier of fact, that the respondent Florida Power and Light Company was not guilty of any negligence in connection with the plaintiffs' injuries.

2. Whether the Court of Appeals was correct in affirming the District Court's holding that the doctrine of implied warranty of seaworthiness was not applicable as against a dock owner who was neither the employer of the injured seamen nor an owner or operator of the barge involved, but who merely tacitly allowed said seamen to use its ladder as a gangplank to board and disembark from said barge.

STATEMENT

The statement as set forth by the petitioners gives undue emphasis to those portions of the evidence favorable to them and minimizes the effect of unfavorable evidence. For these reasons the respondent will adopt as a correct statement of the facts the summary of the case as it appears in the opinion of the Court of Appeals, Fifth Circuit. *Daniels v. Florida Power & Light Co.*, (5th Cir., 1963) 317 F.2d 41.

Omitted from the petitioners' statement is the important fact that both petitioners have compromised and set-

tled their respective claims based on *unseaworthiness* against their employer who was the owner of the tug "Becky" and Gatco Barge Number 40. The petitioner Daniels settled his claim for the amount of $29,706.45 (R 188-192) and the petitioner Speeney settled his claim for $36,876.25 (R 201-205).

Contrary to the petitioners' assertion at the top of page five of their petition, the trial court *did* specifically hold ". . . that the libelants have not established negligence by their evidence up to the close of their case." (R 165).

ARGUMENT

The decision of the Court of Appeals in this case meets none of the "special and important reasons" set forth by Rule 19 of the Supreme Court Rules as justifying the exercise of this Court's jurisdiction to review a decision of a court of appeals by writ of certiorari. Moreover, the reasons for granting the writ set forth by petitioners on page three of their petition are not well taken, for reasons which will hereinafter be set forth.

The petitioners first contend that the Court of Appeals' opinion places a restriction on the congressional intent to protect seamen from injury incurred in maritime service.

This reasoning is completely fallacious for the reason that there is no federal statute involved in this case, insofar as this respondent is concerned, and therefore, the question of congressional intent is not at issue herein. Furthermore, the policy of both the statutory and the decisional law has always been and is at the present time, to place upon the *owners* or *operators* of vessels the responsibility for injuries incurred by seamen. That policy

was carried into effect in the instant case since both petitioners recovered from their employer, the owner of the vessel, full and adequate compensation for their injuries, Daniels receiving the amount of $29,706.45 (R 188-192) and Speeney receiving $36,876.25 (R 201-205).

This decision does not in any way affect the rights of seamen as against their employers or the owners and operators of vessels. The respondent in this case is merely the owner of a dock. It has *never* been held that an owner of a dock is liable to a seaman (or for that matter to any other business invitee) on any theory *other* than by common law tort liability for negligence.

The petitioners next contend that the effect of the decision below is to allow the defenses of contributory negligence and assumption of risk in actions predicated on maritime law. This contention represents a gross distortion of the meaning and effect of the Court of Appeals' decision.

In the first place the actions against the respondent, Florida Power & Light Company, were predicated solely on the theory of *negligence* (R 6) and no charge of unseaworthiness was asserted as to Florida Power & Light Company until the argument of counsel just prior to the dismissal of this action! *Daniels* v. *Florida Power & Light Co.*, (5th Cir., 1963) 317 F.2d at page 41.

However, even if it be assumed that unseaworthiness was properly raised against the respondent as a basis for the petitioners' claims, the Court of Appeals definitely did *not* hold that contributory negligence or assumption of risk was a defense to the claims based on *unseaworthiness*. It merely held that because the respondent, Florida Power & Light Company was neither an owner nor operator of the vessel, nor the employer of the petitioners, there was no

implied warranty of seaworthiness on which liability for the petitioners' injuries could be predicated. As will be demonstrated presently this holding is eminently correct and in absolute harmony with prior decisions of this Court.

Moreover, the holding of the Court of Appeals on the issue of negligence was not based upon proof of the affirmative defenses of contributory negligence and assumption of risk, but rather on the affirmance of the trial court's finding that the respondent, Florida Power & Light Company was guilty of *no* negligence as to the petitioners. *Daniels* v. *Florida Power & Light Co.*, (5th Cir., 1963) 317 F.2d 41 at pages 42-43.

The defense of contributory negligence was not even mentioned anywhere in the opinion. There was an apparent oblique reference to the defense of assumption of risk. However, in view of the Court of Appeals' holding that there was *no negligence* by the respondent, this reference to assumption of risk was unnecessary to the disposition of the case.

However, even if the Court of Appeals had squarely held that the defenses of assumption of risk and contributory negligence were applicable with regard to the claim for negligence, such holding would have been correct. A case very nearly in point is *Spaulding* v. *Parry Nav. Co.*, (2nd Cir., 1951) 187 F.2d 257. In that case the defendant, Todd Shipyard Company, was a ship repair company performing repair work on a ship of which the plaintiff was a crew member. The defendant Todd, while engaged in repair work on the ship, furnished a ladder or gangplank to the ship from which the plaintiff fell and was injured. The plaintiff recovered under the Jones Act from the shipowner who then sought contribution or indemnity from the defendant Todd Shipyard Company.

It was held that the shipowner could not recover from the repair company unless that company would have been liable to the injured seaman directly. The Court of Appeals, assuming that maritime law was applicable to the case, held that the ship repair company was not liable because of the existence of valid defenses under the fellow servant doctrine and under the doctrine of assumed risk. These defenses, it was held, would have been available to the ship repair company in an action by the seaman directly because the ship repair company, being neither a shipowner, operator, nor employer of the seaman was not subject to the Jones Act.

Likewise, the defenses of contributory negligence and assumption of risk were available to the respondent in the instant case under either Florida or maritime Law, inasmuch as the respondent was not the employer of the libelants and did not own or operate the barge upon which they were injured.

It has already been pointed out, of course, that these defenses were not material to the decision on appeal in the instant case since there was a finding of no negligence by the lower court, which was correctly affirmed on appeal.

In any event, the decision of the Court of Appeals herein has no effect whatever on the state of the law insofar as it relates to the rights of seamen against their employers, or against shipowners or operators of vessels.

Lastly, the petitioners contend that the decision of the Court of Appeals herein is in conflict with this Court's holdings in the cases of *Seas Shipping Co.* v. *Sieracki*, (1946) 328 U.S. 85, 90 L. Ed. 1099, 55 S. Ct. 872, and *Reed* v. *Steamship Yaka*, (1963) U.S. , 10 L. Ed. 2d 448, 83 S. Ct.

The respondent submits that no such conflicts exist. The holding of the Court of Appeals in the instant case is merely, first, that on the facts presented there was *no negligence* on the part of the respondent, and second, that the doctrine of unseaworthiness is inapplicable to the respondent since the respondent is not a shipowner, ship operator or employer of seamen.

Even a cursory examination of the *Sieracki* and *Reed* decisions reveal their total irrelevancy to the issues involved in the case at bar.

The holding of the *Sieracki* case was merely that a *shipowner's* obligation of seaworthiness extended to longshoremen injured while working aboard the ship, when such longshoremen were employed by an independent stevedoring contractor who the owner had hired to load or unload the ship. This case has the effect of placing the liability for seamen's injuries on the *shipowner*. This decision is in complete harmony with the decision in the instant case because in the action at bar the burden of compensation *was* assumed by the *owner* of the vessel involved. Thus, the result reached by the Court of Appeals herein represents no encroachment upon the traditional concept of the shipowner's liability for injuries to seamen.

The *Reed* case, *supra*, merely held that, in the absence of a statute, a bareboat charterer is personally liable for the unseaworthiness of the chartered vessel and that the Longshoremen's and Harbor Workers' Act did not prevent recovery by a seaman for the employer-charterer's breach of warranty of seaworthiness.

Thus, it is seen that in the Reed case liability was again placed on the *operator* of the vessel for unseaworthiness. There is nothing whatever in the instant case which conflicts with that holding.

The sole question of federal law involved in the instant case is whether one who is *not* an employer of a seaman or a shipowner or operator may be held liable for the injuries of a seaman under the doctrine of unseaworthiness.

This question has already been answered in the negative by this Court in the case of *Romero* v. *International Terminal Operating Co.*, (1959) 358 U.S. 354, 3 L. Ed. 2d 368, 79 S. Ct. 468. In that case the firm of Garcia & Diaz was the husbanding agent for the vessel "S. S. Guadalupe" and was engaged in overseeing certain carpentry work aboard the ship when the libelant, a crew member, was injured when struck by a cable. The libelant brought an action against Garcia & Diaz, among other defendants, basing his claims both on the Jones Act and general maritime law. The lower court dismissed the claim against Garcia & Diaz pursuant to its finding that that firm was not the employer of the libelant nor did it have operation and control of the vessel upon which he was injured. Regarding the propriety of the lower court's ruling on this issue, this Court made the following statement:

> "At the pre-trial hearing the District Court concluded that Garcia & Diaz was not Romero's employer and did not operate and control the vessel at the time of the injury. *These issues were properly adjudicated, and thus the claims for unseaworthiness and maintenance and cure were properly dismissed.*" (Emphasis supplied).

The Supreme Court did, however, remand the case for further proceedings on the claim against Garcia & Diaz for their *negligence* since that claim was independent of the employment relationship or of the operation and control of the vessel. See also the subsequent opinion of the Court of Appeals in the same case. *Romero* v. *Garcia & Diaz, Inc.* (2nd Cir., 1961) 286 F.2d 347.

Thus the law is plain that one who is not the operator or owner of a vessel or the employer of the libelant seaman, is liable *only* for *negligence* and is *not liable* under the doctrine of unseaworthiness.

The respondent thus submits that the decision of the Court of Appeals in this case is correct and that there is no basis for the exercise of this Court's jurisdiction in this case.

CONCLUSION

For the foregoing reasons the respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

SAMUEL J. POWERS, JR.,
First Federal Building,
Miami 32, Florida,
Counsel for Respondent Florida Power & Light Company

BLACKWELL, WALKER & GRAY,
First Federal Building,
Miami 32, Florida,
Of Counsel for Respondent Florida Power & Light Company.

I, SAMUEL J. POWERS JR. one of the attorneys for Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of , A.D., 1963, I served a copy of the foregoing Brief for Respondent in Opposition on CARL V. DANIELS and JAMES E. SPEENEY, Petitioners.

by mailing copies thereof in duly addressed envelopes, with postage prepaid, to their respective attorneys of record, as follows:

To: Mr. Jacob Rassner,
15 Park Row,
New York 38, New York,
Counsel for Petitioners, Carl V. Daniels and James E. Speeney.

To: Mr. Monte K. Rassner,
19 West Flager Street,
Miami, Florida,
Counsel for Petitioners, Carl V. Daniels and James E. Speeney.

Samuel J. Powers, Jr.